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No. 89-35

In the Supreme Court of the United States

OCTOBER TERM, 1989

THE SUAREZ CORPORATION, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly rejected petitioner's due process and free speech challenges to administrative proceedings before the United States Postal Service that resulted in the issuance of an order directing petitioner to cease and desist from making certain false representations in connection with a scheme to help persons locate "unclaimed funds."

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Donaldson v. *Read Magazine, Inc.*, 333 U.S. 178 (1948)	5
Marshall v. *Jerrico, Inc.*, 446 U.S. 238 (1980)	4
Murchison, In re, 349 U.S. 133 (1955)	4
Withrow v. *Larkin*, 421 U.S. 35 (1975)	4

Constitution, statute and regulation:

U.S. Const.:	
Amend. I	2, 3, 5
Amend. V	3
39 U.S.C. 3005	2, 5
39 C.F.R. 952.17	5

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OPINIONS BELOW

The court of appeals' order affirming the judgment of the district court (Pet. App. 1a) is unreported. The opinions of the district court (Pet. App. 2a-3a, 4a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1989. The petition for a writ of certiorari was filed on May 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1985, the United States Postal Service filed an administrative complaint against petitioner seeking to enjoin it from making certain false representations

in connection with a mass mailing campaign that it was conducting. The mailing, which had been sent to approximately 1.9 million persons, was sent by petitioner under pseudonyms such as "Department of Unclaimed Funds." The mailing suggested that if the recipient completed a form and returned it along with a $19 fee petitioner would advise him how to claim certain funds being held for him. Persons who sent in the $19 did not receive any money, but instead received a booklet listing the addresses of government agencies holding unclaimed funds and "discuss[ing] other possible sources of unclaimed money such as safe deposit boxes." Pet. App. 20a.

The Postal Service alleged, pursuant to 39 U.S.C. 3005, that the mailings contained false representations. After a five-day hearing, the administrative law judge (ALJ) agreed. In concluding that petitioner falsely implied that it was a government agency, the ALJ relied on evidence showing, for example, that the letters petitioner sent from the "Department of Unclaimed Funds" had a "picture of an eagle in the upper left-hand corner * * * clutching an American flag." Pet. App. 26a. The ALJ concluded that petitioner's mailings were misleading in other ways as well. For example, the evidence showed that many state agencies had been contacted by people who received petitioner's letters and "thought that research had been done establishing their eligibility to unclaimed funds." *Id.* at 41a. The ALJ noted petitioner's contention that its mailings were protected by the First Amendment, but rejected that argument on the ground that the First Amendment does not protect false advertisements. *Id.* at 54a. Accordingly, the ALJ issued an order requiring petitioner to cease and desist from making the false representations charged in the administrative complaint in connection with any promotion through the mails. *Id.* at 56a-57a. The ALJ also issued instructions to petitioner's local postmaster

directing him to refuse to deliver mail to petitioner related to the promotional enterprise charged in the complaint and forbidding the payment of any postal money order drawn to petitioner in connection with that scheme. *Id.* at 58a-63a.

Petitioner then filed a complaint in the United States District Court for the Northern District of Ohio alleging that (1) the ALJ's decision was not based upon substantial evidence, and was arbitrary and capricious and an abuse of discretion; (2) the administrative proceedings conducted by the Postal Service deprived petitioner of due process under the Fifth Amendment because ALJs conducting such proceedings are biased in favor of the Postal Service; and (3) the cease-and-desist order issued by the ALJ in this proceeding deprived petitioner of freedom of speech in violation of the First Amendment. The government moved to dismiss petitioner's First and Fifth Amendments claims. The district court granted the motion, stating that "the claims asserted in Counts II and III [the due process and free speech claims] are subsumed in the appeal set forth in Count I, which alleges that the challenged action is not based upon substantial evidence and is arbitrary, capricious and an abuse of discretion." Pet. App. 3a. The district court subsequently held that the ALJ's decision was supported by substantial evidence. *Id.* at 4a-15a. The court of appeals affirmed the judgment of the district court on the basis of the district court's opinion. *Id.* at 1a.

ARGUMENT

Petitioner does not renew its argument that the ALJ's order was not supported by substantial evidence, but contends that the courts below improperly rejected its constitutional arguments. Review is not warranted to consider those contentions.

Petitioner argues that because the respondents in administrative proceedings before the Postal Service are usually unsuccessful, the administrative officials responsible for making the decisions in those proceedings are "prejudiced and biased against all respondents brought before them." Pet. 7. Petitioner does not assert that Postal Service proceedings are procedurally defective, nor does petitioner make any specific allegations of personal bias with respect to the ALJ in this case. However, petitioner suggests that "judicial officers who share the same office premises in L'Enfant Plaza as those who prosecute cases before them" are bound to be prejudiced. *Ibid.*

However, this Court has rejected a due process challenge to administrative proceedings based on the combination of prosecutorial and adjudicative functions in a single agency. *Withrow* v. *Larkin*, 421 U.S. 35, 46-55 (1975). None of the three cases cited by petitoner (Pet. 9) suggests that any other result is appropriate here. In two of those cases, the Court rejected global challenges like petitioner's to an entire category of administrative proceedings. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980) (rejecting a due process challenge to Labor Department proceedings before ALJs in which the civil penalties assessed for child labor violations were returned to the office that investigated and prosecuted the case); *Withrow* v. *Larkin*, *supra* (rejecting a due process challenge to a state medical examining board which both investigated charges of medical misconduct and conducted administrative hearings on the same charges). In the third case, the Court held that a State law authorizing a judge to act as a "one-man grand jury" in secret proceedings and then to adjudicate contempt charges arising out of those proceedings, thus placing the judge in the incompatible roles of witness and decision-maker, violated due process. *In re Murchison*, 349 U.S. 133 (1955).

Those cases cast no shadow on the propriety of the administrative proceedings conducted by the Postal Service under 39 U.S.C. 3005. In those proceedings, ALJs act, in public, as adjudicators, not as witnesses. See 39 C.F.R. 952.17. The record demonstrates that the administrative proceeding in this case afforded petitioner a full opportunity to respond to the allegations in the Postal Service's complaint, and the "very thorough opinion" of the ALJ (Pet. App. 9a) shows that he conducted a careful and balanced review of the evidence. In stating that petitioner's due process claim was "subsumed" in his challenge to the merits of the ALJ's decision (*id.* at 3a), the district court recognized that petitioner's due process claim was indistinguishable as a practical matter from its factual argument that the case against him had not been proved by the Postal Service. The court correctly concluded that the ALJ's findings were supported by substantial evidence, a conclusion petitioner does not challenge, so petitioner was not deprived of due process.

Petitioner's contention that it was deprived of review of its First Amendment claim is also without merit. As the ALJ recognized (Pet. App. 54a), the First Amendment does not protect false advertising. *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948). Thus, whether petitioner's free speech rights were violated depends entirely on whether its advertising was deceptive, which it was.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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